Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/26112/2014

THE IMMIGRATION ACTS

Heard at Field House
On 22 September 2015

Decision & Reasons Promulgated
On 25 September 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE PEART

Between

SALAHUDDIN HAMMAD
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Saini of Counsel
For the Respondent: Mr Kandola, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Pakistan, born on 14 December 1991.

2. The appellant made an application for leave to remain as a Tier 4 (General) Student on 31 March 2014 which was refused by the respondent on 5 June 2014. The respondent did not accept that the appellant met the requirements of paragraph 245ZX(c) in terms of his competency in the English language, he failed to meet the requirements of paragraph 245ZX(d) with regard to maintenance because he submitted a false bank statement and was further refused under paragraph 322(1A) because of the deception used. Judge A J Parker (the Judge) allowed the appeal

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because he found there was no evidence the bank statement was false and that, on the evidence before him, the appellant had passed his English language test.

3. The respondent appealed the Judge's decision. The grounds claim the Judge made a material error as follows:

   (a) The appellant applied for a Tier 4 (General) visa having been granted 60 days to enrol with a suitable education provider following the withdrawal of the licence from his previous sponsor. The fresh application was refused on the basis of the appellant using a false bank statement under paragraph 320 and because the Home Office could not access his English language test results. Further, the application was refused on maintenance grounds as the false bank statement could not be relied upon.

   (b) The grounds conceded the Secretary of State did not produce evidence with regard to the document check which was said to show the bank statement was false, however, the judge erred in finding the statement was reliable. It was not clear from the decision which bank statement was produced by the appellant at the hearing and what period it covered. The grounds speculate that the judge was quite possibly precluded from considering that bank statement and indeed, he made a self direction at [8] of the decision that s.19 of the UK Borders Act restricted the evidence that could be considered that was not submitted with the application. It was entirely unclear what bank statement was produced and whether any dates were clear that related to the date of the application in March 2014 or if it had been submitted with the application. The judge erred because he gave no clear reasons for explaining how the appellant could meet the maintenance requirement.

   (c) The judge also arguably erred in finding that the appellant had properly passed an approved language test. The judge noted that the appellant's evidence was that he assured him there was a delay in the result being uploaded by the organisation who provided the test but that was not evidence that could have been submitted with the application if it was the appellant's case that the result was not available online in June 2014 when the decision was taken, but was available just before the hearing. Further, the judge erred in finding that despite the appellant being unable to meet the provisions of paragraph 276ADE, that it was possible for a freestanding assessment to be made. The judge nowhere properly dealt with why a student who had been in the United Kingdom for less than five years had a private life claim that was not adequately covered by the Immigration Rules. Even if the judge had been able to conduct an assessment outside the Rules, the reasons for finding removal disproportionate were inadequate, seemingly on the grounds that the appellant was disadvantaged in making his application because the test results were not put on line by his educational provider.

4. Upper Tribunal Judge Martin granted permission to appeal on 8 May 2015. She found that it was arguable that:

   (a) Although the Judge correctly rejected the allegation of a false document due to an absence of evidence from the Secretary of State, he erred because he did not make clear the basis upon which he found the maintenance requirement to be met.

   (b) The Judge erred in taking into account evidence that came into existence after the date of the decision, that is, the English language test result.

   (c) In light of the possible errors set out above, the Judge's conclusion that the Secretary of State's refusal was disproportionate was in error.

5. There was no Rule 24 response.

6. The Judge's decision was promulgated on 16 March 2015.

<u>Submissions on Error of Law</u>

7. Mr Kandola accepted that the respondent had failed to lodge a document verification report but that was not the end of the matter as it was incumbent upon the judge to make a decision on maintenance grounds. A bank statement had been produced which the judge referred to at [9] of his decision, however, there was no explanation from the judge in that context as to why he pointed out s.19 of the UK Borders Act restricted evidence that he could take into account. Although the judge referred to **<u>JF</u> (para 320 refusal; substantive rule?) Bangladesh [2008] UKAIT 00008**, there was no analysis of the appellant's circumstances set against case law. As regards the English language test certificate, that was supplied post-decision such that the judge erred in finding that the appellant had properly passed an approved language test.

8. Mr Saini identified the relevant issues, the fact that an alleged fraudulent bank statement had been produced and that the appellant had been unable to verify his English language test results.

9. As regards the bank statement, Mr Saini drew my attention to **<u>MH</u> (respondent's bundle: documents not provided) Pakistan [2010] UKUT 168 (IAC)**. That case was proposition for the obligation on the part of the respondent to supply a document to the Tribunal if it was mentioned in the reasons for refusal or if it was relied upon. The bank statement was at page 64 of the appellant's bundle. It was dated 17 February 2014 and predated, by a little over a month, the appellant's application. That being the case, the judge did not err in taking the statement into account.

10. As regards the English language test, the appellant was unaware that his details had not been uploaded to the Pearson website as of the date of his application. The appellant relied upon **<u>Naved</u> (student – fairness – notice of points) [2012] UKUT 14 (IAC)**. The appellant said that it was an error on the part of the test centre not to put his results online as of the date of the application. Once he received the respondent's refusal he contacted the test centre such that the omission was remedied.

Conclusion on Error of Law

11. I find the judge erred with regard to the maintenance requirements and the English language test results:

12. **Maintenance**. The respondent said the appellant had failed to meet the requirements of paragraph 245ZX(d) with regard to maintenance. He was required to show living costs of £9,000 but the bank statement at page 64 of the appellant's bundle had not been accepted as evidence of funds because according to the respondent it had been proven to be false. Whilst the judge was entitled to come to the conclusion that there was no evidence the bank statement was false, he erred when he engaged no further with that document. The judge carried out no analysis as to how it was that the statement showed the appellant met the maintenance requirements. In particular, the judge carried out no currency conversion exercise. In such circumstances, I find the judge erred in law.

13. **English language test results**. The appellant's application indicated he had submitted a test report showing he had sat a Pearson English test. It was a requirement for the appellant to have assigned his Pearson test score to the respondent in order to allow online verification of the document. When the respondent checked the Pearson website on 5 June 2014 the appellant's score could not be verified. It was explained by the appellant at the hearing that on receiving the refusal, he had spoken with the test centre who had failed to upload the results.

14. The report indicates clearly on its face "***Note to institutions**: This score report is not valid unless authenticated on the PTE academic score report website: www.pearsonvue.com/ptescores*."

15. The judge did not explain at [11] of his decision how, as of the date of the hearing he was able to find that the appellant had passed the Pearson test, bearing in mind the lack of authentication online.

16. I next consider whether there was any obligation on the respondent to give the appellant the opportunity to comment, which is what the judge said at [11]. It might be that if the respondent had checked the website after the appellant had raised the issue with Pearson, she would have found the appellant's authenticated test score report there, but I do not accept that the process overall was unfair in terms of **Naved**. In my view, it was incumbent upon the appellant to ensure his documentation was in order at the time of his application. This was not a situation such as in **Naved**, where the application was refused because of the appellant's failure to produce a document that he was never asked to produce. On the contrary, the respondent in this appellant's case was clear in her requirements and the appellant was under an obligation to ensure that the respondent's requirements were met. The process did not become unfair vis-à-vis the appellant and the respondent because of the test centre's error.

17. At [12] the judge said that if his decision under the Immigration Rules was incorrect he would consider the appellant's rights under Article 8. The judge found that the appellant had no family life. In allowing the appeal under Article 8, he relied upon

his same findings with regard to the appeal under the Immigration Rules, which he said made the respondent's decision disproportionate. The judge failed to take into account that he had carried out no analysis of the maintenance requirements, set against what the bank statement revealed. He said as regards s.117B that the appellant satisfied the requirement not to be a burden on the taxpayer, however, there was no explanation as to why that might be so.

18. The judge found as regards the test result that the respondent's failure to give the appellant the opportunity to comment upon or provide evidence that he had passed the language test placed an unjustifiable burden upon the appellant whether with regard to the application process itself, the case law **Naved** or the process by which the test provider made provision for the authentication of its test results, but there was no reasoned explanation as to why that might be so.

19. The correct approach remains a two stage process. See **Patel [2013] UKSC 72** and **Sunassee [2015] EWHC 1604 (Admin).** The Immigration Rules must be met. If not, then the public interest demands the appeal is dismissed save for any issues not covered by the Rules which are described as a "*gap*" between the Rules and Article 8 at [36] of **Sunassee**. It was incumbent upon the judge to carry out an analysis, explaining the gap (if any) between the Rules and Article 8 and carrying out a balancing exercise discussing the public interest. His analysis was inadequate in that regard such that his findings and conclusion erred in law.

Notice of Decision

20. The judge erred in allowing the appeal. The appeal is remitted to the First-tier Tribunal to be re-heard de novo. None of the judge's findings shall stand.

Anonymity direction not made.

Signed Date 22 September 2015

Deputy Upper Tribunal Judge Peart